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Nos. 90-221 and 90-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JIM MATTOX, Attorney General of Texas, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

The States of Alabama, *et al.*, as *amici curiae*, incorrectly assert that "[i]f state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C. App. § 1381." Alabama Br. 8. In response to this incorrect assertion, the Assistant General Counsel for the Department of Transportation ("DOT") has written to counsel for the *amici* States, pointing out that the federal

government's enforcement powers also include both civil and criminal penalties and that substantial civil penalties have been assessed and collected:

> In fact, under Section 901 of the Federal Aviation Act (49 U.S.C. App. § 1471), this Department has the authority to impose civil penalties of up to $1,000 per violation and $1,000 per day for each day of a continuing violation of the pertinent provisions of the Act or any rule, regulation or order issued thereunder. The imposition of criminal penalties is also possible under 49 U.S.C. App. § 1472 for knowing and willful violations of those provisions. Since this Department assumed the powers of the Civil Aeronautics Board over consumer protection in the airline industry in January 1985, we have assessed civil penalties of more than $1,000,000 in consumer protection cases involving violations of Section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381) and have reached substantial settlements involving monetary restitution to consumers.

Letter dated October 4, 1990, from Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings, DOT, to Warren Price, III, Attorney General of Hawaii (attached hereto as Exhibit A).

Counsel for the *amici* States actually had been advised earlier by the General Counsel of DOT that "the Department has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totalling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned unfair or deceptive fare advertising by airlines." Letter dated August 3, 1990, from Phillip D. Brady, General Counsel, DOT, to Warren Price, III, Attorney General of Hawaii (attached hereto as Exhibit B).

DOT has suggested to counsel for the *amici* States that it would be appropriate "to correct the statement in your brief." Ex. A at 2a. This supplemental brief for respondents is filed in the event that the *amici* States do not choose to make this correction themselves.

For the reasons stated here and in the brief in opposition, the petitions for writs of certiorari should be denied.[1]

Respectfully submitted,

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[1] Respondents' corporate parents and partially owned subsidiaries are listed in the appendixes to the brief in opposition.

EXHIBITS

EXHIBIT

EXHIBIT A

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

October 4, 1990

Honorable Warren Price, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Re: Nos. 90-221 and 90-232, *Jim Mattox, et al.*, v. *Trans World Airlines, Inc., et al.*, In the Supreme Court of the United States

Dear Mr. Price

Recently you and seven other state attorneys general submitted an amicus brief in support of the above-referenced petitions for writ of certiorari. One statement in your brief reflects an apparent misunderstanding of this Department's enforcement powers which we would like to clarify.

The statement in question is contained in the first sentence of the first full paragraph on page 8 of the brief. It reads—

> If state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C. App. § 1381.

In fact, under section 901 of the Federal Aviation Act (49 U.S.C. App. § 1471), this Department has the authority to impose civil penalties of up to $1,000 per violation and $1,000 per day for each day of a continuing

violation of the pertinent provisions of the Act or any rule, regulation or order issued thereunder. The imposition of criminal penalties is also possible under 49 U.S.C. App. § 1472 for knowing and willful violations of those provisions. Since this Department assumed the powers of the Civil Aeronautics Board over consumer protection in the airline industry in January 1985, we have assessed civil penalties of more than $1,000,000 in consumer protection cases involving violations of section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381) and have reached substantial settlements involving monetary restitution to consumers. The fact that we have collected substantial civil penalties in deceptive advertising cases was pointed out in our letter of August 3, 1990, which was sent to you and all other state attorneys general (copy enclosed). In addition, the Secretary's authority to issue enforcement orders has been delegated to various individuals within the Department under 49 CFR Part 1 (See, *e.g.*, 49 CFR 1.57a) and 14 CFR § 302.200 *et seq.* You may thus wish to correct the statement in your brief.

I trust that this information is useful to you and I am sending a copy of this letter to the other attorneys general who joined with you in filing your amicus brief and to the other Counsel of Record in the case. In closing, I would like to reiterate the invitation contained in our August 3 letter for increased cooperation in the area of airline consumer protection enforcement.

Sincerely,

/s/ Samuel Podberesky
SAMUEL PODBERESKY
Assistant General Counsel for
Aviation Enforcement and
Proceedings

Enclosure

cc Ronald D. Secrest, Esq.
Counsel of Record
for Respondents

Albert Norman Shelden, Esq.
Counsel of Record for the 33
Attorney General Petitioners

Honorable Linley E. Pearson
Attorney General of Indiana

Honorable Robert J. Del Tufo
Attorney General
of New Jersey

Honorable Paul Van Dam
Attorney General of Utah

Stephen Gardner, Esq.
Counsel of Record for Petitioner
Jim Mattox, Attorney General
of Texas

Honorable Don Siegelman
Attorney General of Alabama

Honorable Mike Moore
Attorney General of Mississippi

Honorable Ernest D. Preate, Jr.
Attorney General
of Pennsylvania

Honorable Mary Sue Terry
Attorney General of Virginia

EXHIBIT B

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

Aug. 3, 1990

Honorable Warren Price, III
Attorney General of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813

Dear Mr. Price:

The purpose of this letter is to ask you to join the U.S. Department of Transportation in our efforts to prevent unfair and deceptive practices in the air transportation industry. As you may know, the Department is responsible for implementing and enforcing the Federal Aviation Act of 1958, 49 USC 1301 *et seq.* Section 411 of the Act, 49 USC 1381, prohibits unfair and deceptive practices in air transportation and its sale. In addition to section 411's general mandate, various Department rules, regulations, and policy statements promulgated under section 411 and orders issued under that section govern particular aspects of the air transportation industry, including advertising and other consumer protection matters.

Since the sunset of the Civil Aeronautics Board in 1985, this Department has enforced section 411 aggressively, primarily emphasizing consumer protection. In enforcement actions by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, the Department has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totaling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned unfair or deceptive fare advertising by airlines. Addi-

tionally, our Consumer Affairs Office has resolved consumer problems in innumerable cases where enforcement action would not have been appropriate.

The Department staff has enjoyed cordial relationships with many state officials in consumer affairs and Attorney General offices, and worked together with these state officials to resolve many airline consumer problems. However, it is our intention to do everything possible to achieve an even greater level of cooperation as we well recognize that we can carry out our enforcement program much more widely and effectively with your assistance than we can on our own. In fact, your assistance could well be critical in many cases.

Accordingly, we would request that any time that you become aware of any unfair or deceptive practice in the airline industry or any other potential violation of the Federal Aviation Act or our implementing regulations and policy statements (14 CFR Parts 200-399), contact should be made with Hoyte Decker, Chief of our Consumer Affairs Office (202-366-5957), or Sam Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings (202-366-9342). By working together we will certainly achieve the greatest possible success in protecting airline consumers. Your assistance in this important undertaking is very much appreciated.

Sincerely,

/s/ Phillip D. Brady
PHILLIP D. BRADY
General Counsel